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**MILITARY COMMISSIONS—“THIS IS REALLY NOT A GOOD TOPIC FOR A
PAPER ON THE INTERAGENCY PROCESS,” OR IS IT?**

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THE INTERAGENCY PROCESS

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MILITARY COMMISSIONS—“THIS IS REALLY NOT A GOOD TOPIC FOR A PAPER ON THE INTERAGENCY PROCESS,” OR IS IT?

Absent such a compelling justification, today’s order is deeply disturbing and further evidence that the administration is totally unwilling to abide by the checks and balances that are so central to our democracy.” Washington Director, ACLU, Fox News Report.

We reached out not just to those people identified [earlier in the briefing], but also to the experts within the building...[who] were very important in the development of these procedures.” “And we also, of course, consulted with other agencies. We considered everything that we heard on the Hill and in the press.” DoD General Counsel, DoD News Briefing.

In the aftermath of the September 11, 2001, terrorist attacks, proposals emerged to fulfill President Bush’s September 20, 2001, promise to a shocked nation that “[w]hether we bring our enemies to justice, or bring justice to our enemies, justice will be done.” (Address to Joint Session of Congress 1). On November 13, 2001, less than 2 months after his address, the President unveiled the administration’s policy to fulfill his promise. On that date, President Bush issued an order directing the use of military commissions to prosecute terrorists for violations of the law of war against the United States.

Observers accustomed to the ordinarily languid policy process in the United States were undoubtedly impressed—but under the circumstances likely not surprised—by the accelerated pace with which the administration issued this significant policy. This was due in part to the incredibly hard work of dedicated public servants responding to a national crisis. It was also due, however, to the insular actions of the Executive branch concerning the initial decision to direct the use of military commissions. At that stage of the policy, little respect was shown for the interagency process, an approach that prompted widespread criticism from Congress, the media, and interest groups.

The divergent views quoted at the outset illustrate the evolution of the policy process from the military order to the implementing procedures. While the Bush administration ably defended its initial decision before Congress, it did take counsel of the criticisms and revised its approach to the implementation of the policy. The administration adopted an approach much more characteristic of a process vice Executive fiat. This point is best illustrated by the methodology used to craft the March 21, 2002, procedures for conducting military commissions. Those procedures are the result of coordination, comment, and debate, all of which resulted in a more complete and comprehensive final product.

This paper will discuss both the policy and process behind the decision to order military commissions. It will first examine the authority for military commissions. It will next examine the authority of the President to alone order the commissions, concluding that the President had the authority to act alone, a conclusion that likely colored the administration's approach to the interagency process. It will next identify the other policy options available to the administration and the rationale behind the decision to choose military commissions.

The paper will then turn to the process. It will examine the response—in fact criticism—to the initial approach taken by the Executive branch. Then, it will examine the evolution of military commissions and the interagency process from the original policy decision to the development of the implementing procedures, ultimately concluding that the interagency process played a much more significant role in the latter.

The Policy.

On November 13, 2001, in a military order entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,” the President announced his decision directing the use of military commissions (Military Order 1). The decision raises two questions

relevant to authority: first, what is the authority for the use of military commissions, and second, what is the authority of the President unilaterally to order military commissions. The former authority is well established; authority for the latter is, like the decision itself, the subject of debate and controversy.

“Military commissions derive their authority from Articles I and II of the Constitution” (ABA Task Force Report 2). “The Constitution empowers the Congress to define and punish violations of international law as well as to establish courts with exclusive jurisdiction over military offenses” (Elsea, CRS Report 3). Specifically, Article I, Section 8, Clause 1 of the Constitution empowers Congress to “. . . provide for the common Defence . . .” Clauses 10-14 of that same section empower Congress to “define and punish Piracies . . . on the high seas and offenses against the Law of Nations; declare War . . . and make Rules concerning Captures on Land and Water; To raise and support Armies . . . and To make Rules for the Government and Regulation of the land and naval Forces.” Article II, Section 1 of the Constitution confers “executive Power” on the President and Article II, Section 2 directs that the President shall serve as the “Commander in Chief of the Army and Navy (U.S. Constitution).”

United States law authorizes military commissions to deal with offenders or offenses that violate the laws of war. Congress provided for military commissions in Article 21 of the Uniform Code of Military Justice (UCMJ).” It provides in relevant part that:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost court, or other military tribunals (UCMJ Art. 21).

There is ample precedent in our history for the lawful use of military commissions, a full survey of which is not possible here. However, the United States Supreme Court in its 1952 decision

entitled Madsen v. Kinsella best summarized the authority for and history of the use of military commissions. The Court opined that “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting urgent government responsibilities relating to war. They have been called our common-law war courts” (Madsen v. Kinsella 346-7). There were thousands of cases tried by military commissions in World War II for violations of the law of war as well as crimes committed in territories occupied by the military (ABA Task Force Report 4). Perhaps the most famous case, and certainly the one most cited in support of President Bush’s order, is entitled Ex Parte Quirin. That seminal case involved the trial of 8 German saboteurs who during World War II entered the United States by submarine. The defendants were captured and held in the United States, and President Roosevelt ordered their trial by military commission. The saboteurs challenged their trial by military commission, arguing that other, i.e. civilian, courts were still operating and should have exercised jurisdiction. The Supreme Court held that trial by military commission did not offend the Constitution. Thus, the authority for the use of military commissions is well established—the authority of the President to alone order those commissions, however, is not without debate.

There exists ample support for the President to alone order trials by military commissions. As with any matter involving the law (and lawyers), there is also ample room to challenge that proposition. Nonetheless, “each time Congress has revised the rules for courts-martial, it has also confirmed the right of the president as Commander in Chief to convene military commissions for the enforcement of the law of war” (Wedgwood 328). Not surprisingly, President Bush cites in the preamble to the military order his authority as Commander in Chief. A declaration of war from Congress would provide the Commander in Chief with the broadest authority for the exercise of his war powers. Of course, there has been no formal declaration in

the war on terrorism. However, “military commissions, or similar military tribunals have been used in hostilities in which there has been no declaration of war . . . (ABA Task Force Report 5). Additionally, UCMJ Article 21 does not require a formal declaration of war before the President orders the use of military commissions and, as one commentator has noted, “the absence of a formal declaration makes no difference” as the law of war applies in any international state of armed conflict (Wedgwood 335).

It can be reasonably argued that the September 18, 2001, Joint Resolution of Congress bolsters the argument that the President may lawfully act unilaterally in issuing the order. In the resolution, Congress authorized the President to “use all necessary and appropriate force” against those responsible for the attacks of September 11 (Joint Resolution 1). This resolution was cited in the preamble to the military order as another source of authority for the President’s action. The President and his advisors were certainly confident of his authority and—believing approval was his and his alone—apparently saw no requirement to exercise the full interagency process prior to issuing the decision. One can speculate whether this was a tactical decision, anticipating that in times of intense crisis, few would seriously challenge the President’s authority to issue this decision. The President would get what he wanted, how and when he wanted it, unencumbered by the delays inherent in the interagency process.

There has been no litigation—yet—challenging the President’s authority to unilaterally order military commissions. The American Bar Association’s Task Force on Terrorism and the Law concluded that such authority would be “least likely open to question when it is supported by an explicit act of Congress” (ABA Task Force Report 6). One critic of the policy is more adamant about the need for Congressional approval, stating that “this administration has not requested nor obtained congressional authority and there is no doubt that authority [from Congress] is

necessary” (Flannery 1). Flannery argues that the plain language of the Constitution, i.e., that Congress shall make the rules concerning captures on land and water in time of war, requires that Congress authorize the President to order military commissions. Ambassador David Scheffer, former US Ambassador at Large for US War Crimes Issues, asserts “absent a new act of Congress, a military commission would lack authority to enforce antiterrorism laws or even crimes against humanity that do not overlap with the law of war” (Scheffer 1). While envisioning a limited role for military commissions (after congressional action), Ambassador Scheffer urges instead the use of U.S. or foreign courts to try the terrorists.

Other less controversial policy options are available for the President to fulfill his promise to the nation. One such option is the use of civilian U.S. federal courts. Those courts would have jurisdiction over most of the offenses committed against the United States by members of Al Qaeda or the Taliban. Several terrorist cases have been brought in federal court, including the trials of Zacarias Moussaoui, John Walker Lindh, and Richard Reid. The use of the federal courts was the preferred method in the 1990s, “charging terrorism and murder under American federal statutes” (Wedgwood 329). Critics of the military order also cite the federal trials completed in 2001 of the terrorists responsible for the 1993 World Trade Center (WTC) bombing as examples of how the existing court system can adequately address such cases without use of “jerry-built military commissions [that are] unnecessary to successfully prosecute terrorists” (Gittens 2).

Major—and arguably overwhelming—concerns exist, however, with this option. They include the physical security of the proceedings; the ability to safeguard classified information and sources; the security of the participants, e.g., witnesses, counsel, jurors, and judges; and the lengthy delay—as in the 1993 WTC bombings—in bringing these cases to court.

Terrorists could also be prosecuted in the courts of foreign countries for violations of that country's laws. When this option would be preferable is hard to imagine. Such trials would jeopardize intelligence sources, standards for due process in most if not all foreign courts are less than the military commissions, and a grieving American public would likely find this option an inadequate forum in which to seek justice.

The final option is the use of an *ad hoc* international tribunal. This option presents problems similar to those for trials in U.S. civilian courts and more; protecting intelligence sources, physical security of the proceedings, and protection of the participants would be jeopardized. Significantly, international politics would ensure that justice in such tribunals is neither swift nor understandable to the American public.

In light of existing options, and taking into account the Bush administration's goals in the war on terrorism, the clear best policy choice was the use of military commissions. As one senior DoD official stated, the administration rightfully recognized that the United States was at war and that wartime measures were needed in response (Nonattribution Interview #1). The senior official commented that the September 11, 2001, attacks were only the latest in a series of what amounted to wartime engagements—the 1993 ambush of soldiers in Somalia, the 1993 truck bombing of the World Trade Center, the 1995 bombing in Riyadh, the 1996 bombing of the Khobar towers, the 1998 attacks on U.S. embassies in Africa, and the 2000 bombing of the U.S. Cole and that “the rules had changed.” Opponents of military commissions, noted the official, failed to grasp that indeed times had changed, that the U.S. was in a state of war, and solutions therefore must fit the changed circumstances. The best solution for the changing times was for the President to forego existing forums and direct military commissions. How the President

reached that decision—as well as the decision itself—quickly became the object of criticism, debate, and controversy.

The Process.

“This is really not a good topic for a paper on the interagency process. Well, at least not for the initial stages of the policy” (Nonattribution Interview #2). That observation was consistent with criticisms levied at the Executive branch in the aftermath of the November 2001 release of the military order. This DoD official went on to note that the order was a complete surprise to him and his colleagues who worked in an office where they would have expected that such a policy, with its significant impact on DoD, would have been at least informally staffed for comment. This official further observed that such an approach was “different from how the last [Clinton] administration operated” where agencies worked through consensus and that while seeking consensus slowed decisions, the opportunity existed for more fully informed decisions. In the case of the military order, in this official’s opinion, the content was not a product of the interagency process.

Another anonymous DoD official noted that the impetus for the use of military commissions began with individuals close to the White House and discussions on the merits of the policy were shared with very few (Nonattribution Interview #3). This official stated that only a very select few in the White House, DoD, and the Department of Justice were involved in the original order. As to the original order, the official believed, the administration’s “secretive” approach adversely affected the quality of the military order. As many military officers learn when first exposed to the interagency process, this official noted that the “process used was contrary to how soldiers plan. There was a lack of collaboration among the staff” (Nonattribution Interview #3).

In discussing the military order in the context of the interagency process, it is more relevant to ask, “who else didn’t know.” Most notably Congress did not. “The President promulgated his order without consultation with Congress,” stated Senator Arlen Specter in legislation he introduced in February 2002 (Military Commission Procedures Act of 2002). Senator Patrick Leahy observed in December 2001 that the “administration’s failure to consult with Congress on the military tribunals fundamentally jeopardizes the separation of powers that undergirds our constitutional system, and it may undercut the legality of any military tribunal proceeding” (Lancaster 3).

Perhaps one of the harshest, albeit short-lived, Congressional reactions to the order came from Representative Kucinich who offered legislation to eliminate funding for military tribunals (Lancaster 2). Representative Kucinich withdrew the measure, stating he never intended to seek a vote on it, but that he “just wanted to raise the profile on the issue” (Lancaster). Indeed, the profile had been raised and the Senate ultimately held five hearings on military commissions, four by the Senate Judiciary Committee and one by the Senate Armed Services Committee. While Congressional response was swift and loud, it was not necessarily confrontational. As Lancaster notes, no one wanted to appear soft on terrorism nor oppose a very popular President in a time of national crisis. Senator Leahy, according to Lancaster, expressed doubt about the wisdom of passing of passing legislation challenging the President’s course, stating, “I’m not unaware of the polls” (Lancaster 2).

The media and interest groups joined the drumbeat against the policy and the approach taken by the administration. Among them, the ACLU, Human Rights Watch, The National Legal Aid and Defender Association, and legal scholars raised their voices and in doing so raised the consciousness of the administration. As a result, information began to flow from the

administration to those groups as well as to Capitol Hill and the administration took the opportunity to make its case for military commissions. The information campaign appeared to work and, albeit after the fact, produced a general consensus on the advisability of and authority for military commissions. The next step for the administration was to prepare procedures for the military commissions, a responsibility given to DoD by direction of the President's military order.

On March 21, 2002, the Department of Defense released its procedures for the conduct of military commissions. In doing so, Secretary Rumsfeld stated:

We have made every reasonable effort to establish a process that is just; one that protects both the rights of the defendant to a fair trial, but also protects the rights of the American people to their security and to live as they were meant to live, in freedom, free of terrorists (DoD News Briefing 3).

In their final form, as compared to the draft procedures leaked in December 2001, the "rules are much more sensitive to the legal rights of the accused than they were originally outlined" (Tully 1). There were several important changes made and generally they have been met with favor. Mr. Robert Hirshon, President of the American Bar Association, in a statement dated March 21, 2002, commended DoD for its effort, noting that while continued work needed to be done, the ABA was pleased that the Department had adopted many of the recommendations of its Task Force.

Many of those revisions are the direct result of the interagency process and coordination with individuals and agencies outside the government. As articulated by both Secretary Rumsfeld and the DoD General Counsel, the final product was the result of extensive interplay among agencies and organizations—and the Department ensured that its collaborative approach was made known. "In the months since the president issued his order, we have consulted with a number of

experts . . . in and out of government . . . and in and out of Washington” (DoD News Briefing 2). In that same briefing, the DoD General Counsel affirmed this approach, noting the Department’s consultation with other agencies, Congress, and input from the media. Assistant Secretary of Defense Wolfowitz echoed this sentiment, noting that the procedures were published at the completion of a “fairly exhaustive process” (Wolfowitz PBS Interview 2).

Lower level officials within DoD confirm these observations. In nonattribution interviews, those officials state that the procedures were briefed extensively to other agencies, among them the National Security Agency, State Department, Defense Intelligence Agency, Federal Bureau of Investigation, and the Central Intelligence Agency. Collaboration, they noted, within the Executive was noticeably more active, and a DoD interservice working group was established to vet many of the issues at the lowest level practicable. By all accounts, this extensive coordination resulted in an improved final product that seemed to quiet the critics. Additionally, although two bills were introduced in Congress proposing alternative implementing procedures, Congress has not shown a willingness to supplant DoD’s role in drafting the procedures and the legislation has not been forwarded. After receiving briefings on the procedures, Congress seemed willing—at least thus far—to support DoD’s efforts.

The collaborative process used for the procedures did more than make the participants in this process feel good. The process resulted in substantive changes to the procedures, many of which were suggested by early critics of the policy. Changes attributable to outside influences include: the requirement for an unanimous vote in death penalty cases; permitting the use of hearsay evidence, although a development not likely to be welcomed by defense counsel; clarity in the use of and procedures for plea bargain agreements; and, appointment of defense counsel (Nonattribution Interview #3).

The interagency process used for the procedures was probably still less than an interagency purist would want. At times, DoD was selective with whom they coordinated and coordination was not always done in an attempt to build consensus but more to keep relevant participants informed (Nonattribution Interview #3). Additionally, coordination was sometimes done not seeking concurrence, but seeking comments that “would be considered”(Nonattribution Interview #2). Nonetheless, while the process may at times have been selective, it demonstrated a significant change from that used to develop the military order. As a result, the approach obtained “buy-in” from key participants in the policy process and minimized criticism. Efforts continue regarding the military commissions and DoD is using a similar collaborative approach in drafting the language for the crimes and defenses.

Conclusion.

Ultimately, this proved a very good topic for a paper on the interagency process. It was illuminating in several respects. First, that significant policy decisions are made outside of—or perhaps in spite of—the interagency process. The unanswered and potentially troubling question is how often does this occur. Second, that although the administration’s process was not executed in the customary sequence as to the initial order, it reacted to the criticisms, open and critical debate was had, and consensus obtained. And third, that public reaction to the administration’s military order prompted a change in the administration’s approach to the development of the March 2002 procedures. The result was a complete and comprehensive final product that was generally well received. Collaborative efforts continue, and it is abundantly clear that the President remains on a determined course to deliver his promise to the American people. 600 detainees await the next step in that course.

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